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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

NO. 335

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, Petitioner,

versus

THE UNITED STATES OF AMERICA EX REL. CHESTATEE PYRITES & CHEMICAL CORPORATION, Respondent.

BRIEF FOR RESPONDENT CHESTATEE PYRITES & CHEMICAL CORPORATION.

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THE ISSUE.

As respondent* conceives the issue in this case, it is: Are the losses suffered for expenditures for the items involved here within the provisions of the Act of October 5, 1918, as amended and supplemented by the Act of March 2, 1919?

With the issue as stated, the only showing required is that a claim for such losses was made and that such claim was disallowed because of the belief of the petitioner that the law did not permit such allowance.

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*Respondent as used herein means Chestatee Pyrites & Chemical Corporation, claimant in the Interior Department and Relator in the trial court, and Petitioner means the petitioner herein, the Respondent in the trial court.

The petition for the writ of certiorari and petitioner's brief inadequately state the facts and therefore we believe it helpful to the Court to assemble the facts with reference to the broad, general issue and also with reference to the issue as to each particular item of the claim.

STATEMENT OF THE ITEMS CLAIMED.

The claim presented to the Secretary is based upon items as follows:

1. Property purchased as a result of the requests and demands of the Department of the Interior;
2. Expenditures for salaries paid executive officers; and
3. Legal expenses (R. 2, par. 6).

We do not consider the item of taxes as the petition for certiorari abandons any opposition to that item.

In answering the petition in the trial court petitioner admitted the allegations with reference to salaries and legal expenses but showed he was inadequately informed as to the property items (R. 7, Answer par. 6). That petitioner might be fully advised, an amendment was filed explaining the purchase of property item and saying:

> "The claim for property taken over as the purchase of property, is based upon the finding of said Briar* in said report, wherein he gave the cost of the prestimulated plant as $149,040.38, and out of which allowances were made of $16,901.07; $26,427.86 and $32,453.27; such allowances not being allowed as purchase of property, but as rental, proportion of salvage, and for tools, material, etc., completely used. The remainder of such cost, so found by said assistant commissioner, was disallowed on his statement that 'to allow for its purchase would be, in fact, to allow for the purchase of property.' " (R. 24).

By an amended answer, petitioner said:

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*Assistant Commissioner who wrote the opinion of the Department of the Interior denying the items here claimed.

"The respondent denies as a *matter of law* that the salaries alleged to have been paid by the petitioner, that the property alleged to have been taken over in the nature of purchase of property by the petitioner, that the taxes alleged to have been paid by the petitioner, constituted losses sustained by it within the meaning of the act of March 2, 1919, and its amendments." (R. 25).

This allegation and this answer show that the issue is as stated above.

In Note 3, page 4 of petitioner's brief, an effort is made to escape the effect of the findings pleaded by him as exhibits. In the trial court it was contended notwithstanding the stipulation (R. 6, 31) that such exhibits should not be considered. The trial judge adjudicated that the exhibits were part of the answer (R. 32). It is now contended that the findings were merely advisory. If advisory, they were adopted when made part of the answer, and further, they were accepted and followed by the Secretary of the Interior (R. 23, Exhibit E). However, even the present Secretary's supplemental answer here is sufficient to show the facts on which this suit was based.

The trial judge, the amount of the items not being in dispute, adjudged that as to each of the items named petitioner "proceed with the final adjustment of the relator's claim * * * and finally to adjust those items of the claim as items allowable under the said act of March 2, 1919, in accordance with the amounts due as determined by him" (R. 32); "determined by him" means the determination shown in exhibits to petitioner's answer (R. 12–23).

The Court of Appeals, in affirming the judgment of the lower court, stated the issue as arising under the acts of October 5, 1918, and March 2, 1919, to be whether or not

"net losses incurred for the purchase of property prior to the stimulation period * * * and purchased by relator during the period and expenditures for * * * legal services and salaries * * * are items of net loss which the Secretary of the Interior is required by law to consider in adjudicating an award" (R. 34–36).

It is clear from the above that the trial judge and the Court of Appeals properly construed this case as involving solely a question of law which legal question is clearly and definitely stated herein, in the pleadings copied above and in the quotation from the opinion of the Court of Appeals.

1. Purchase of Property.

That property purchased and lost within the specified conditions of the act of March 2, 1919, construed with the act of October 5, 1918, is an allowable item, has been determined by this Court. Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Company, 284 U. S. 231. That respondent admittedly complied with the specified conditions of the statutes and is entitled to have its net losses adjusted, liquidated and paid, is not questioned (see R. 2, par. 4; R. 7, par. 4).

Petitioner, as stated above, sets up as an exhibit to his answer in the trial court a statement of the findings of the Department of the Interior with reference to the items of this claim. As to one piece of property, the loss on which was $750.00 (R. 22), petitioner has abandoned the contention made in the Court of Appeals (R. 33, par. 3). As to the other item of property, petitioner's findings begin the discussion by saying:

> "Then comes the equipment which was purchased before stimulation, but used during stimulation, which the auditor presents for consideration in connection with salvage." (R. 20).

Such findings then proceed to discuss another claim, describe a former holding of the Department of the Interior and say:

> "The reason *why the purchase price* will not be allowed is because the Government was in no wise responsible for *its purchase*, and the claimant at the moment he purchased the property had incurred any loss that might come, and that loss was therefore his own. To allow for its purchase would be in fact to allow for the *purchase of property*." (R. 21) (Italics ours.)

The findings then proceed to allow for supplies used up and for rental on property contracted for by N. P. and Geo. L. Pratt before stimulation and purchased after stimulation by the respondent corporation. In further discussing this item, it is said that the property so purchased by the Pratts, the original lessees, was, subsequent to stimulation, turned over to the Chestatee corporation in return for stock in that corporation and for the further consideration of the assumption by the corporation of the unpaid purchase price of the property (R. 27).* Petitioner answers that this property acquired by the Pratts before stimulation but sold by them and purchased by the respondent thereafter, was used "subsequent to stimulation in the production of a war mineral" (R. 27). The opinion then shows the total amount of this item, that there should be deducted therefrom amounts allowed as rental, salvage and an amount used up. Petitioner then finds the balance to be $73,658.18. This, says the opinion of Mr. Briar (R. 21), was disallowed because purchased by the Pratts, incorporators of claimant, prior to the stimulation date, although "it represented the balance of the *cost* of the claimant's (Chestatee Pyrites and Chemical Corporation's plant and equipment," and was "the purchase price" thereof. (R. 28). The statements by Mr. Briar were approved by the Secretary of the Interior (R. 23), occur in Exhibits D and E, part of the plead-

*The petition for certiorari, p. 4, says the "Pratts turned over * * * ." (See also brief of petitioner, p. 5). There should be added here what the record at page 27 shows, that this property was "turned over" to claimant, Chestatee Pyrites & Chemical Corporation, respondent here, in consideration of "the stock in that corporation which they had issued to themselves, and in part consideration of a so-called agreement which they, themselves, made on behalf of the corporation, as its incorporators and sole stockholders, whereby the corporation assumed such portion of the indebtedness, which they, themselves, had incurred prior to stimulation through the *purchase* of the said machinery, equipment, tools, and miscellaneous items as then remained unpaid." See also above where petitioner's pleadings refer to "purchase price," "its purchase" and "purchase of property."

ings herein, and control conflicting allegations, if any, in the answer.* However, even the supplemental answer which seeks to avoid the findings of petitioner's predecessor and which findings were stipulated as part of the Record (R. 5, 6, 31), shows a purchase for a consideration of stock and the assumption of the purchase price. This answer says:

> "Thereafter, and subsequent to stimulation, the Pratts turned over all of this aforesaid property to the Chestatee Corporation *in return, as respondent understands and believes, for the stock in that corporation* which they had issued to themselves, and *in part consideration* of a so-called agreement which they, themselves, made on behalf of the corporation, as its incorporators and sole stockholders, whereby *the corporation assumed such portion of the indebtedness*, which they, themselves, had incurred prior to stimulation through the purchase of the said machinery, equipment, tools, and miscellaneous items as then remained unpaid." (R. 27) (Italics ours.)

The trial judge found that the value of the property was as stated above and that it was "taken over by relator after stimulation" (R. 32). In the assignment of errors in the court below, paragraph 2 thereof, it was stated that this property was transferred to the corporation by its incorporators (R. 33).

Petitioner (Brief p. 5) says an award was made of $32,-453.27. The facts are: the Secretary made an award for such of the property as was sold to the corporation and *wholly used up* of $16,901.07; and an award for the rental value of said property not used up of $26,427.86. These were all the awards made under this item. The Secretary found that such property had, proportionate to the whole salvage of all respondent's property, a value of $32,453.27, and in our claim credit of such sum is given the Government as salvage. This leaves due claimant, if the law is as we contend, and under the findings of fact by petitioner the sum of $73,658.18 on this item.

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*Stockton v. Cotton Mills, 11 F. (2d) 618, 619, citing Howe v. Larkin, 119 Fed. 1005, Jobbins v. Kendall Mfg. Co., 196 Fed. 216, and also see Vital v. Kerr, 297 Fed. 956, 962.

It cannot therefore be questioned that the facts show without dispute that the Pratts, incorporators of respondent here, having a small plant, and having purchased certain property and machinery therefor, found themselves unable to comply with the demands of Mr. Secretary Lane greatly to enlarge the capacity to produce pyrites. Petitioner pleaded what his Department found:

> "In this particular case, as is testified, the then Secretary of the Interior personally requested one of the claimants to operate the properties on a big scale, which claimant at first declined to do. * * * the Secretary, through his personal agent, requested Ashcraft and Wilkinson to use their influence to induce claimant to enlarge his operations, and further, he asked them to assist in financing him." (R. 17).

Being so requested and financed, there was organized a corporation which purchased the property formerly owned by the Pratts. For this property so purchased, a balance of $73,658.18 was not awarded because, as said by the Secretary, it would be "in fact to allow for the purchase of property" (R. 21).

In this connection it must be remembered that the opinion of the Interior Department written by Mr. Briar, which is under review here, clearly shows that respondent here was practically coerced into the expenditure of the monies which it lost and for which it seeks an award. The opinion, set up as a portion of the answer of petitioner, says:

> "* * * the record showed that the then Secretary of the Interior, realizing no doubt that this property presented opportunity for the biggest production of pyrites in the entire country, used every means in his power to persuade the claimant to develop it. It is true that he could not and did not guarantee claimant against loss, but his full influence short of underwriting the project was exerted. Always, too, there was a realization that claimant, in responding to Government request, will suffer great financial loss, notwithstanding the generous provisions of the war minerals relief act." (R. 22).

2. Salaries.

At Record 22 appear expenditures made by respondent from June 18, 1917, to November 11, 1918, "agreed upon by the auditor for the Government and the auditor for claimant," and among such expenditures, for which no allowance was permitted, appears this item:*

"Executive salaries.....$25,966.67."

An award for this item was denied for the reason stated as follows:

> "A straight salary allowance to a partner or part owner of a property would mean the granting of a profit to him." (R. 22).

The amount and reasonableness of these salaries were not questioned but the author of the opinion evidently thought that if a man was a stockholder in a corporation, he was a "part owner" and not entitled to a salary therefrom.** It may be that a salary is a profit to the man who gets it but it is an expense to the corporation which pays it and here respondent paid salaries as is admitted and the only legal contention that could be made is, and that we understand is the one made, that because the officers were the sole stockholders of the corporation, they were not entitled to salary. That legal question we will discuss later.

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*To understand this finding the plan of the auditor for the Department of the Interior should be kept in mind. This plan is described as follows:

> " * * * that all expenditures during the stimulation period, or which properly should be charged to the period, were to be listed; that deductions for items not allowable and salvage were to appear, and that the net loss was thus to be shown." (R. 14).

**The subsistance allowance referred to in the petition for certiorari, p. 5, was not a salary but in "lieu of salary" because as quoted above, the Assistant Commissioner thought a salary was profit.

Referring to salaries, petitioner (Brief p. 6) says:

> "After consideration and deliberation he determined, as a matter of fact, that all the respondent was entitled justly and equitably to receive as an allowance on account of the services of the Pratts was the sum of $4,032. (R. 9–10; 26–27)."

Here again petitioner disregards the findings here sought to be reviewed. Let us look to the record cited. Pages 9 and 10 deny recovery because of the close identity of stockholders and corporation. At record 26–27, it is claimed that the Secretary considered the amount of the salary. This plea is disingenuous and conflicts with the opinion made part of such plea. The opinion says the amount was an expenditure (R. 22) and that no salary however large or small will be paid because (R. 22).

> "A straight salary allowance to a partner or part owner of a property would mean the granting of a profit to him. Subsistence is allowable, but if he is to receive compensation above subsistence it must come from profits earned by the corporation or partnership."

Salaries have uniformly been disallowed by the Secretary because he and his predecessors thought that the law did not authorize an allowance therefor. The reasonableness of a particular salary has, therefore, never been considered by petitioner or any predecessor and that issue of fact is open for consideration should the legal issue be decided in respondent's favor.

3. Legal Services.

That legal services were incurred to the extent of $585.75 is shown in the opinion set up by petitioner as his reasons for his findings heretofore made in this case. The rather naive answer is:

> "The Secretary also found that the services rendered by the attorneys conferred a continuing benefit upon the relator, and that their value was not lost to it in producing or in preparing to produce pyrites" (R. 30).

That the "expenditure" was made is agreed (R. 22) and that the amount was disallowed is unquestioned. The sole purpose of the corporation was to produce pyrites. Why a corporation is not entitled to hire a lawyer to advise it is difficult to understand. The only purpose for which respondent was organized was to develop a mine and produce a necessary mineral. In the course of executing this purpose, legal services were necessary and the record shows that the amount and fact of the expenditure therefor were "agreed upon by the auditor for the Government and the auditor for claimant" (R. 22).

STATUTES INVOLVED.

The Acts of March 2, 1919, November 23, 1921, and February 13, 1929, are copied in Appendices to the petition for the Writ of Certiorari. The Act of October 5, 1918, is, so far as necessary, copied as an Appendix hereto.*

THE CONTENTIONS OF PETITIONER.

Argument and Authorities.

Petitioner (Petition 6) as to items of purchase of property and salaries relies upon the claim of identity of Corporation and Stockholder and as to legal service upon the argument that legal services are not necessary in a mining operation.

As to expenditures for legal services, petitioner found they were incurred but said they "conferred a continuing benefit" and ergo "their value was not lost" (R. 30). No discussion of so illogical a conclusion is necessary.

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*Cases showing respondent's right to "just compensation" and a "liberal interpretation" of these statutes are: United States v New York, 160 U. S. 598; Stewart v. Kahn, 78 U. S. 11 Wall. 493, 504; Monongahela Navigation Company v. United States, 148 U. S. 312, 326; and Seaboard Air Line Ry. Co. v. United States, 261 U. S. 299.

The Claim Of Identity Of Corporation And Stockholder.

That executive officers are also stockholders, even if they be the sole stockholders does not deprive them of the right to receive salaries. The argument that salaries are profits is wholly unsound. A salary paid by a corporation is an expense deductible as such from income taxes and when paid and lost as here, it is a loss for which an award should be made. If the stockholders were not officers, some other person would have to be and there is no law requiring stockholders to work for their corporations for nothing.*

The argument that the corporation and its stockholders are one is equally unsound and is answered by this court, Klein v. Board of Tax Supervisors, 282 U. S. 19, 24, where the court said:

> "The corporation is a person, and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members. Donnell v. Herring-Hall-Marvin Safe Co., 208 U. S. 267, 273, 52 L.ed. 481, 487, 28 S. Ct. 288."**

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*The word "salary" is "never applied in describing the gain, profit, or recompense which accrues to one who is conducting a business of his own" (Roberts v. Carrithers, 180 Ky. 315, 202 S. W. 659, 661). " 'Profits' and 'salary' are quite different terms." (Hoeland v. Lange, 113 Misc. 469, 471, 184 N. Y. S. 885). "Dividends are distinguished from salary." (Peo. v. Lynch, 254 N. Y. 427, 431, 173 N. E. 571).

**This rule is accepted and discussed in many cases and by text book writers. We cite but a few. Cases are collected in Exchange Nat. Bank v. Meikle, 61 Fed. (2) 176, 179, 180. A complete review of the subject, and of the cases, will be found in the new edition of Fletcher Cyclopedia Corporations, Vol. I, p. 84, et seq. under the heading "Corporation as Distinct from Members." See a discussion of the subject by Machen under the title "Corporate Personality," 24 Harv. Law Rev. 355.

The memorandum of the Assistant Commissioner, Exhibit D to the response, shows that the Chestatee Pyrites Corporation was without funds and that its operations in response to Government stimulation were on borrowed capital. (R. 13–21).

The Assistant Commissioner (R. 23) said:

> "Always, too, there was a realization that claimant in responding to Government request will suffer great financial loss, notwithstanding the generous provisions of the War Minerals Relief Act."

The utlimate parties at interest, therefore, under this claim are those who, were constrained by the Government to lend to the corporation the funds used in complying with the appeals from the Secretary of the Interior to produce Pyrites "on a big scale" (R. 17) as a patriotic service to aid in the crisis of a great war.

The Secretary, petitioner here, set up as an Exhibit to his pleadings findings, stating:

> "The activities of the Government to induce Ashcraft and Wilkinson to finance claimant, so that war needs might be met quickly and in large measure, were personal, direct, and effective. The fact that Secretary Lane, who himself had a part not only in the stimulation of claimant but, through suggestion, in the financing, recognized that Ashcraft and Wilkinson had performed a service to the Government, is evidence of that service." (R. 19).

Further he pleads:

> "It is established that they urged claimant to enlarge his enterprise, and that they volunteered to secure the money therefor" (R. 17).

To disregard the corporate entity and accept the stockholders as the real parties at interest is to proceed on a theory directly contrary to the facts. It arrives not at truth, justice and equity, but at the contrary. In a word—there is no such showing in this case as would justify the court in departing from the usual practice of treating a corporation as a separate

entity.* The quotation, p. 6 of petitioner's brief, with relation to legal services, again shows a conflict between pleading and exhibit. The exhibit (R. 22) shows an agreed expenditure "which properly should be charged" (R. 14), which was listed but deducted (R. 22) for the legally unsound excuses quoted above from the opinion of petitioner's predecessor. It will also be noted that while the original response (R. 10) is as quoted by petitioner, the supplemental response agrees with said opinion (R. 30). The fundamental error of the petitioner in dealing with the claims for salaries and for property purchased by the stockholders before stimulation and incorporation and sold to the corporation thereafter, is that he treated the corporation and the stockholders as one and the same.

Geo. L. Pratt and N. P. Pratt, when the Secretary of the Interior began urging them to produce "on a big scale," had leased some mineral property and contracted for the tools, equipment and machinery for the size plant necessary for a small but profitable enterprise. This lease and the tools, equipment and machinery were, under the urging of Mr. Secretary Lane and his agents, and against the wishes and judgment of Geo. L. Pratt, "turned over," sold to, the corporation for certain stock and the assumption by the corporation of the unpaid balance on undelivered machinery. Everything

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*The "entity rule" upon which we rely here is never disregarded except to prevent "illegality, fraud or injustice." See cases cited by petitioner, p. 10 of his brief, especially Eichelberger v. Arlington Building, 280 Fed. 997, 999, 1000. What was said in the Eichelberger case applies here:

> "How then, can it be said that the creation of the corporation and the conveyance to it of the property had the effect of perpetrating fraud or injustice against Eichelberger?" (P. 1000)

The United States, through Mr. Secretary Lane, promoted, under the conditions then constraining patriots, practically compelled, the "creation of the corporation" and no "fraud or injustice" against the United States is even adumbrated.

bought by respondent was necessary to and used in the enlarged operation. It can make no difference to the United States whether the Pratts or others were the sellers. Indeed, there would have been no reason in justice and equity why the Pratts themselves could not have recovered after they were induced to change their small and profitable enterprise to the enlarged one had they operated individually instead of organizing a corporation.

In view of the broad language of this court when the meaning of the statutes here involved was in issue here, it is surprising that questions settled in principle by your former decision should again be brought here.

It is respectfully submitted that the decision of the Court of Appeals is free from error.

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November 28, 1932.

APPENDIX.

Act October 5, 1918.

A state of war having on the 6th day of April, 1917, been declared to exist between the United States and the government of Germany, the need for war minerals in this country, most of which were imported from abroad, became immediately imperative. It was apparent that the government could not and should not rely upon the continuance of such importations. We were forced to produce these minerals in this country.

How best to accomplish such production was one of the vital questions that confronted the government in the early days of the war. Large sums were devoted to advertising the needs of the government in this respect and in encouraging and stimulating immediate large-scale production of these minerals. Cabinet officers and other important agents of the Nation pleaded for such production. The question was extensively discussed in Congress, beginning early in 1918. The resulting bill finally passed and approved October 5, 1918, was entitled:

> "An Act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of those ores, metals, and minerals which have formerly been largely imported, or of which there is or may be an inadequate supply."

The Essential Substance of the Act.

The Act is printed 40 Stat. 1009 and following. Section 1 provides:

> "By reason of the existence of a state of war, it is essential to the national security and defense, and to the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to provide for an adequate and increased supply, to facilitate the production, and to provide for an equitable, economical, and better distribution of the following-named mineral sub-

stances and ores, minerals, intermediate metallurgical products, metals, alloys, and chemical compounds thereof, to-wit: * * * pyrites * * * as the President may, from time to time, determine to be necessary for the purposes aforesaid, and as to which there is at the time of such determination, a present or prospective inadequacy of supply. The aforesaid substances mentioned in any such determination are hereinafter referred to as necessaries."

Section 2 authorized the President to purchase such necessaries and to enter into contracts for the production thereof. The section further makes certain provisions for the cost price, which shall be at a price not "less than the purchase or cost of production thereof."

Section 3 authorized the President to take over mines producing the named minerals, and provided:

> "The United States shall make *just compensation*, determined by the President, for the taking over, use, occupation or operation by the Government of any such necessaries or any such land, deposit, mine, smelter, or plant, or part thereof." (Italics ours.)

This section also provided that if the "just compensation" to which the owner was entitled could not be agreed upon with the President, suit therefor or for a part thereof could be maintained.

Sections 4 and 5 are administrative.

Section 6 appropriated the sum of $50,000,000 to "be used as revolving fund for carrying out the objects of this Act, and for the purpose of making all payments and disbursements, including *just compensation* under section three."

Sections 7, 8 and 9 are administrative and not material here.

Section 10 terminated the operative force of the Act, upon the proclamation of peace by the President.

Sections 11 and 12 are not material here.

This Act in effect would have authorized the President or his agents to enter into whatsoever arrangements were deemed necessary for procuring an adequate supply of these war

minerals. Had the war continued, the President under this Act would have been enabled fully to protect those who answered the call of the Government to produce these minerals. However, as the Act was approved so near the date of the Armistice, it was never resorted to.

With the cessation of war, the demand for these war minerals practically ceased, and the producers were faced with immediate and heavy losses. How to give "just compensation" (Section 3, Act of Oct. 5, 1918, supra) to those persons who at the request of certain named agencies of the government had in effect surrendered their properties to the government, was the question then presented to Congress, and after hearings, and on the 23d day of December, 1918, Senator Henderson introduced a bill entitled:

Title of Bill, Senate.

> "A Bill to supplement an Act of Congress approved October fifth, nineteen hundred and eighteen (public numbered two hundred and twenty), and to authorize the Secretary of the Interior from the funds appropriated by said Act to determine, adjust, and pay losses sustained by investments preparatory to production of war minerals mentioned in said Act."

After discussions in the House and Senate and by Conference Committees, the Act of March 2, 1919, was passed. (See history, Appendix to Brief in Docket 67, October Term, 1931.)